# BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

LAVADA TAYLOR	)
Claimant	)
	)
VS.	)
ADAMS BUSINESS FORMS	)
Respondent	) Docket No. 1,035,158
AND	)
	)
FEDERAL INSURANCE COMPANY	)
Insurance Carrier	)

## ORDER

Respondent requested review of the February 5, 2010 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on May 4, 2010.

## **A**PPEARANCES

Gary Peterson, of Topeka, Kansas, appeared for the claimant. Jeff S. Bloskey, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that 1) respondent no longer contends claimant had a pre-existing permanent impairment; 2) respondent is entitled to an offset in the sum of \$228.23 per week pursuant to K.S.A. 44-501(h) as a result of claimant's social security payments; 3) Dr. Brodine's report dated January 28, 2009 is not considered part of the record, nor was he deposed for purposes of this claim; and 4) the only task loss opinion contained within the record is 69 percent. The parties also agreed that although not listed in the ALJ's Award, the preliminary hearing transcript from the October 6, 2009 proceedings should be considered part of the record, although the exhibits attached to that transcript are not to be included, unless otherwise admitted.

#### Issues

The ALJ adopted in part the opinions expressed by Dr. Peter Bieri, the court appointed independent medical examiner, and found the claimant to have a functional impairment of 9 percent to the body as a whole as a result of the January 5, 2007 accident. He further granted claimant a 64.50 percent permanent partial general (work) disability based upon a 69 percent task loss (based upon the opinions and restrictions offered by Dr. Poppa) and a 60 percent wage loss.<sup>1</sup>

The respondent appealed this Award and alleges a number of errors. Respondent first argues that claimant failed to establish permanent impairment to her left leg as a result of her injury. Part and parcel of this argument is the assertion that the EMG test results from March and June 2007 must be excluded from the Board's consideration as respondent contends they are not properly in evidence.<sup>2</sup> Respondent goes on to argue that claimant failed to prove that any of her present diagnoses are causally related to her work-related injury, as evidenced by the testimony of Dr. Hendler. Moreover, respondent contends that even if claimant has established a permanent impairment, she failed to prove that she requires work restrictions and thus, is not entitled to permanent partial general (work) disability in excess of her percentage of functional impairment. Alternatively, in the event that a work disability is awarded, respondent urges the Board to recalculate the Award to reflect not only the agreed-upon offset for claimant's social security benefits (\$228.23 per week), but also an additional \$85.15 per week for the pension she receives from respondent. And respondent seems to argue that the offset should be effective as to all payments, both for claimant's functional impairment award as well as against any work disability award.3

Claimant argues that the ALJ's Award should be affirmed in part and modified in part. Claimant contends the ALJ's findings that she suffered permanent injuries to the left lower extremity, low back and abdomen, and that she has a functional impairment and work restrictions as a result of those injuries should be affirmed. Claimant does, however, ask the Board to modify and increase the ALJ's functional impairment award for those injuries to 14 percent based upon the opinions expressed by Dr. Poppa. Claimant also asks the Board to increase her ultimate work disability finding to reflect claimant's actual

<sup>&</sup>lt;sup>1</sup> The Award utilized an incorrect compensation rate. The parties agreed to a base wage of \$602.07 and the correct compensation rate, less the social security offset, is \$173.17. Thus, the calculation must be modified to reflect this change

<sup>&</sup>lt;sup>2</sup> Respondent also argued that Dr. Brodine's report should be excluded as well. But claimant now concedes Dr. Brodine's report should be excluded and thus, there is no issue as it relates to this specific report.

<sup>&</sup>lt;sup>3</sup> Although there was some discussion between the parties at the oral argument that respondent was only asking for the offset to apply against any work disability award, the brief makes it clear that respondent seeks to reduce each and every weekly payment by both the social security and pension amounts.

post-injury wage loss. And while claimant concedes that she is subject to a social security offset, that offset does not limit her functional impairment payments and the offset should not begin until that point in time when she actually began receiving such benefits (September 2008). Finally, claimant maintains that respondent failed to prove the source of the payments for her pension contributions and respondent is, therefore, not entitled to any additional weekly offset under K.S.A. 44-501(h).

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The underlying facts surrounding claimant's accident are not in dispute. Claimant was a long-time employee for respondent hired to work as a support worker. She testified that on January 5, 2007 she was pushing a cart at work that was loaded with paper, and was attempting to turn the cart around when one of the wheels got caught in a hole in the floor. She continued to try to turn the cart, but it had stopped. She then felt pain from the top of her head down. She is specifically claiming injuries to her left leg and ankle, abdomen and low back. Claimant testified at the Regular Hearing that since her accident she has sprained her ankle a couple of times and fractured her ankle once.<sup>4</sup>

Claimant continued working after her injury, at times in a light duty position as respondent has a policy that returned injured employees to work. She continued working until August when she was taken off work by her personal physician who ran a number of tests in order to identify the source of claimant's ongoing abdominal complaints. No abnormalities were found and claimant returned to work in October 2007, continuing to work until December 7, 2007, when the plant closed. In September 2008, claimant applied for and began receiving Social Security Retirement Benefits as well as a pension from respondent. The parties have agreed to the weekly offset amount required by K.S.A. 44-501(h) for the Social Security (\$228.23). But there remains a dispute about whether and/or how to implement the offset of the pension payments which are \$369 per month.

After her accident claimant was treated conservatively. Her symptoms included numbness in the left foot and an EMG was recommended.<sup>5</sup> She was diagnosed with peroneal nerve entrapment at the fibular head and an MRI to the knee showed degenerative findings but with possible focal swelling or contusion of the patellar ligament. The EMG was repeated in June 2007 and although one physician noted that the results

<sup>&</sup>lt;sup>4</sup> R.H. Trans. at 9.

<sup>&</sup>lt;sup>5</sup> Hendler Depo., Ex. 2 at 50 (Dr. Hendler's July 5, 2007 report at 3).

were "normal", that same physician also noted that there was, nonetheless, decreased innervation potential evidenced by the test.

She was thereafter referred to Dr. Steven Hendler for treatment in July 2007. Despite two sets of EMG tests (one in March 2007 and another in June 2007) both of which revealed abnormalities consistent with peroneal neuropathy of the knee<sup>6</sup> and her description of her complaints, he believed she might not be suffering from peripheral neuropathy. He sent her for an MRI for her spine and recommended a series of physical therapy visits. According to Dr. Hendler, the MRI revealed mild degenerative changes along with Grade I spondylolisthesis at the L3-4 level of the lumbar spine.<sup>7</sup>

Dr. Hendler concluded claimant was at maximum medical improvement as of August 22, 2007 and he released her from treatment with no restrictions at that time. He also rated her with a zero (0) percent permanent partial impairment as a result of the accidental injury.<sup>8</sup> When asked, Dr. Hendler conceded that at the time of this release, claimant was still having back and leg complaints.<sup>9</sup>

Dr. Hendler saw her again in March 2008 to address her complaints of foot drop. <sup>10</sup> She was continuing to complain of leg numbness and although Dr. Hendler conceded claimant was originally diagnosed with peroneal neuropathy, he believed she no longer had that condition. Thus, he could not causally connect claimant's then-present complaints of numbness and foot-drop with her work-related accident. He elected to perform his own EMG to each of the lower extremities in May 2008 and according to Dr. Hendler, those EMG's showed that claimant's left and right lower extremities are normal. <sup>11</sup> He denied that claimant was suffering from any gait disturbance or had any observable foot drop.

Upon cross examination, Dr. Hendler admitted that the EMG's he performed in May 2008 still revealed abnormalities. <sup>12</sup> But he believed her left knee was at least as good as her right and that she required no brace or further treatment. He also noted that she was not making any back or abdomen complaints as of the time of this evaluation in July 2008.

<sup>&</sup>lt;sup>6</sup> *Id.* at 23.

<sup>&</sup>lt;sup>7</sup> *Id.* at 5.

<sup>&</sup>lt;sup>8</sup> *Id.* at 9.

<sup>&</sup>lt;sup>9</sup> *Id.* at 18-19.

<sup>&</sup>lt;sup>10</sup> *Id.* at 9.

<sup>&</sup>lt;sup>11</sup> *Id.* at 12.

<sup>&</sup>lt;sup>12</sup> *Id.* at 23.

In November 2008, claimant was evaluated by Dr. Michael Poppa at the request of her attorney. He too found claimant to be at maximum medical improvement, but he found claimant sustained an overall 19 percent whole body impairment as a result of her accident, including the accident on June 12, 2007, when she sprained her ankle while at work. He rated her lumbar back complaints at 10 percent<sup>13</sup>, her abdominal complaints of pain at 5 percent and her left lower extremity complaints at 6 percent.<sup>14</sup> It should be noted that like Dr. Hendler, he had Dr. Welch's EMG reports from March and June 2007 and reviewed them in connection with his evaluation of claimant and her condition. He testified to this fact without objection.<sup>15</sup>

Although he assigned no restrictions in his initial report, Dr. Poppa authored a followup report in May 2009, indicating that he "neglected" to include the following restrictions:

. . . avoid lifting greater than 35 pounds from floor to waist level on an occasional basis, no lifting greater than 20 pounds from waist to chest height on an occasional basis and no lifting greater than 10 pounds above chest level also on an occasional basis. <sup>16</sup>

Dr. Poppa explained that Dr. Hendler's suggestion that claimant was no longer suffering from peroneal neuropathy was somewhat inaccurate. He testified that the EMG results are subject to interpretation and that in essence, Dr. Hendler's finding that her left leg is "as good as the right" does not indicate that the results are normal or cured. Nonetheless, he conceded that claimant did not indicate she was suffering from a foot drop although she was walking with an antalgic gait.

At the ALJ's request, claimant underwent an independent medical examination in March 2009. Dr. Peter Bieri was appointed to conduct the exam. At the time of his examination, claimant was wearing an assistive device due to a recent injury. Thus, his evaluation of her left lower extremity complaints was somewhat impaired. He also concluded that her recent fall was unrelated because he had no documentation in his file

<sup>&</sup>lt;sup>13</sup> All ratings are pursuant to the 4<sup>th</sup> edition of the *Guides* and unless otherwise indicated, are to the whole body.

<sup>&</sup>lt;sup>14</sup> This 6 percent is converted (pursuant to the *Guides*) from 15 percent to the lower extremity.

<sup>&</sup>lt;sup>15</sup> Poppa Depo. at 54.

<sup>&</sup>lt;sup>16</sup> *Id.*, Ex. 3 at 1 (Dr. Poppa's May 18, 2009 report).

<sup>&</sup>lt;sup>17</sup> *Id.* at 27-28.

<sup>&</sup>lt;sup>18</sup> Claimant reported falling at home and was wearing a CAM walker/boot. No physician has testified that this fall was due to claimant's work-related accident.

that it was related.<sup>19</sup> He ultimately assigned a 4 percent permanent impairment for the residuals of peroneal neuropathy and 5 percent for the lumbar pain and abdominal complaints. When combined this yields a 9 percent permanent impairment.

Dr. Bieri testified that he did not feel that she required any restrictions although his report suggests that after she completed treatment for her recent fall, restrictions might be appropriate. When questioned about that decision not to impose restrictions, he indicated that he chose not to impose restrictions because another physician had released her to return to work. But he also admitted he was unable to identify precisely which physician he was referring to and ultimately he wasn't presently aware whether claimant was working or not.<sup>20</sup> He deferred any decision on restrictions inasmuch as claimant was still in the process of recovering from her ankle fracture.

Claimant testified that since her injury, she experiences periods of numbness in her leg along with weakness when she walks.<sup>21</sup> She also testified that she has low back pain and foot drop, both conditions that persisted up to the time of the Regular Hearing.

At the Regular Hearing, the parties agreed on a base wage (\$602.07). Unfortunately, there was no agreement on the value of claimant's fringe benefits, nor any clear date that the benefits were discontinued. Claimant was asked about the cost of those benefits and to what extent, if any, respondent contributed. But her testimony was anything but specific. The best that can be said is that claimant speculated that respondent might have paid 60 percent of the premium and that claimant's pay stubs reflected that claimant was paying approximately \$54 per week towards that cost.<sup>22</sup>

Similarly, while claimant concedes that respondent pays her \$369 per month in pension payments, the evidence as to the *source* of those payments is not clear. She was asked by respondent's counsel:

Q: To your knowledge, **all or a part** of the money that went into the pension for on your behalf was paid by Cardinal Brands [respondent]. Correct? A: I think so, yes. 23

<sup>21</sup> P.H. Trans. at 7.

<sup>&</sup>lt;sup>19</sup> Bieri Depo. at 8-9.

<sup>&</sup>lt;sup>20</sup> *Id.* at 7.

<sup>&</sup>lt;sup>22</sup> R.H. Trans. at 13.

<sup>&</sup>lt;sup>23</sup> *Id.* at 21.

After this exchange, respondent's counsel asked for leave to amend its pretrial stipulations as he hoped to seek a credit for payment of retirement benefits which were fully funded by the company.<sup>24</sup> He assured the court that he would "get that information" to claimant's counsel.<sup>25</sup> The record contains no information as to the source of those pension funds, other than claimant's statement quoted above.

Claimant also testified as to her post-injury/post-plant closing employments. For approximately 4 weeks she worked part-time for Aldersgate earning \$10 per hour. That job went to full time for the last 2 weeks of her tenure with that employer. Thereafter, commencing in September of 2008 she began working 10-20 hours per week earning \$9.25 per hour as an aide. That job continued up to the time of the Regular Hearing.

After the Regular Hearing in this matter was held in September 2009, but before the case was submitted for decision, claimant sought additional medical treatment with a podiatrist, Dr. Christopher Brodine. At that point, claimant was complaining primarily of foot drop or dragging along with numbness and weakness in her left leg. A preliminary hearing was held and the ALJ granted claimant's request for additional treatment with Dr. Brodine. Respondent appealed that determination to the Board. Included in the evidence that both the ALJ and a single Board Member<sup>27</sup> reviewed was a report authored by a podiatrist, Dr. Brodine.<sup>28</sup> He opined that claimant required an assistive device in order to help stop the foot drop. There was also reference to and consideration of the past EMG's, including those performed in March and June 2007.

Based upon the evidence presented to the ALJ during that preliminary hearing, the Board Member affirmed the ALJ's preliminary hearing Order and found:

Claimant did not have a problem with her left leg or with walking before her accident at work on January 5, 2007. Her subsequent problems with ambulation, weakness, numbness and tingling in her left leg and foot, foot drop, and dragging of her left foot all relate to that accident at work. Her work-related injuries are also the most likely explanation for her subsequent falls and injuries, including her ankle

<sup>&</sup>lt;sup>24</sup> *Id*.

<sup>&</sup>lt;sup>25</sup> Id.

<sup>&</sup>lt;sup>26</sup> *Id.* at 18-19.

<sup>&</sup>lt;sup>27</sup> K.S.A. 2009 Supp. 551(i)(2)(A).

As noted earlier, the parties agreed Dr. Brodine's report is not considered part of the record for purposes of this appeal as he was not deposed. However, in cases of appeals from preliminary hearings, such reports are admissible. K.S.A. 44-534a. Thus, the record for purposes of this appeal is different from that considered during the earlier appeal from the preliminary hearing.

fracture in March 2009. Claimant's need for additional medical treatment is a direct and natural consequence of her January 5, 2007 accident.<sup>29</sup>

From there, the trial of the claim was concluded and submitted to the ALJ for an Award. As noted above, the ALJ granted claimant a 9 percent functional impairment, based upon the opinions offered by Dr. Bieri, the court-ordered IME physician, and he adopted the restrictions imposed by Dr. Poppa. In light of those restrictions, he also granted claimant a work disability under K.S.A. 44-510e(a) based upon a task loss of 69 percent and a wage loss of 60 percent.<sup>30</sup> In granting claimant a work disability, the ALJ referenced and adopted the Board's earlier finding following the preliminary hearing. This appeal followed.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>31</sup> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>32</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>33</sup>

The primary issue in this claim is the nature and extent of claimant's impairment. Intertwined in that argument is respondent's contention that claimant has not established a compensable injury to her left lower extremity, both based upon Dr. Hendler's testimony and the fact that the EMG reports which document an injury are not properly within the Court's record. Conversely, claimant maintains her injury includes not only the low back and abdomen (contentions which respondent does not actively rebut), but her left lower extremity as well. And although not specifically articulated, this argument seems to include the foot drop, weakness and the effects of the subsequent falls she sustained since her work-related accident in January 2007. That was certainly the intent behind the preliminary

<sup>&</sup>lt;sup>29</sup> Board Order, 2009 WL 5385883 (Kan. WCAB Dec. 23,2 009) at 4.

<sup>&</sup>lt;sup>30</sup> This 60 percent wage loss is derived from the limited evidence provided by the parties as to claimant's post-injury employments. It is essentially an average actual post-injury wage of \$9.63 per hour and an average hourly work week of 25 hours, yielding a post injury wage of \$240.75.

<sup>&</sup>lt;sup>31</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>&</sup>lt;sup>32</sup> K.S.A. 2009 Supp. 44-508(g).

<sup>&</sup>lt;sup>33</sup> Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

hearing request for medical treatment which was made after the Regular Hearing was concluded. And that request was bolstered by the opinions of Dr. Brodine. But, as claimant now concedes, that report and the evidence to be gleaned by reviewing that report are no longer in evidence.

The only expert opinions and medical evidence contained within this file is the testimony and reports offered by the parties at the depositions of Drs. Poppa, Hendler and by Dr. Bieri in his report. And none of those physicians make note of a foot drop. In fact, Dr. Poppa, claimant's own physician, testified that had he seen a foot drop he most certainly would have noted it.<sup>34</sup> Those physicians do, however, make specific note of and clearly relied upon the two EMG reports taken in March and June 2007, to which respondent objects. Respondent relies upon K.S.A. 44-519 which provides:

Except in preliminary hearings . . . no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider . . .

The Board finds respondent's argument unpersuasive. The Kansas Court of Appeals in *Boeing*<sup>35</sup> stated:

K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians as long as the testifying physician is expressing his or her own opinion rather than the opinion of the absent physician.

The Kansas Supreme Court in *Roberts*<sup>36</sup> adopted the reasoning of the *Boeing* Court:

The holding of *Boeing* that most applies to the present case is best expressed in syllabus 3: "K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians *as long* as the testifying physician is expressing his or her own opinion rather than the opinion of the absent physician." (Emphasis added.)

Here, the Board relies on the analysis set forth in *Boeing* and *Roberts*, and finds that the physicians can rely upon the two EMG reports generated in March and June 2007 in forming their opinions. And the Board, in turn, can consider that evidence. It appears from the testimony that each of the physicians was testifying as to their own opinions but were,

<sup>35</sup> Boeing Military Airplane Co. v. Enloe, 13 Kan. App. 2d 128, 764 P.2d 462 (1988).

<sup>&</sup>lt;sup>34</sup> Poppa Depo. at 30-31.

<sup>&</sup>lt;sup>36</sup> Roberts v. J.C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997).

as is often the case, relying upon test results performed by others. Thus, respondent's argument must fail.

The Board now turns to the nature and extent of claimant's impairment. Dr. Hendler's records and his testimony make it clear that he was focused on the peroneal neuropathy. Although he admitted claimant had back and abdominal complaints at various times, he seemed to ignore them and ultimately concluded that the neuropathy had resolved and regardless of her ongoing complaints, those complaints were unrelated to her work injury.

In contrast to Dr. Hendler's opinions are those of Dr. Poppa. He examined claimant as well and concluded that she was continuing to suffer from the effect of the neuropathy as well as ongoing complaints of low back and abdominal pain. He assigned a total of 19 percent permanent partial impairment and attributed all of that impairment to the work-related accident. And while it is somewhat troublesome that he did not immediately assign work restrictions, he did explain that he had simply failed to include claimant's lifting restrictions in his original report.

Like Dr. Poppa, Dr. Bieri assigned impairment to claimant's low back complaints but in his view, claimant's abdominal complaints were really more of a function of the back problems and were due to the altered gait and the neuropathy. He assigned a total of a 9 percent permanent partial impairment and did not impose any restrictions.

The Board has carefully considered each physicians' testimony along with the exhibits and claimant's own testimony, and concludes that of these three doctors, Dr. Poppa's ratings and opinions, including restrictions are the most persuasive and consistent with the claimant's recitation of events, her symptoms and ongoing complaints. Dr. Hendler's treatment really did not encompass the entirety of claimant's complaints and conditions and Dr. Bieri, while rating the low back and neuropathy problems and assigning impairment, for whatever reason failed to adequately consider the need for restrictions. Under these facts and circumstances, the Board finds that Dr. Poppa's 19 percent functional impairment is appropriate, along with his restrictions, and the Award is modified to reflect this finding.

Having concluded that claimant bears a whole body impairment, the Board now must consider whether claimant is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a). That statute provides:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any

substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

The Kansas Court of Appeals has recently said that:

The calculation of compensation for permanent partial disabilities under the Workers' Compensation Act is a simple mathematical calculation, and judicial notions regarding the legislature's intent in the enactment of statute, governing calculation of compensation for permanent partial disabilities, are not favored, and judicial blacksmithing will be rejected, even if such judicial interpretations have been judicially implied to further the perceived legislative intent.<sup>37</sup>

Based upon this recent pronouncement, the Board need only consider claimant's task and *actual* wage loss and give no consideration to the reasons behind her lost wages.

The parties have conceded that the only opinion within the record as to task loss is that provided by Dr. Poppa. Thus, the 69 percent task loss found by the ALJ is affirmed. As for wage loss, the Board finds the ALJ's conclusions must be modified.

Claimant testified that she last worked on December 7, 2007. After that, she attended vocational school for a period of time and apparently did not work. Thus, beginning on December 7, 2007 her actual wage loss was 100 percent. At some point in time<sup>38</sup>, she began working for Aldersgate Retirement Village working 20 hours per week earning \$10 per hour (\$200 per week). This continued for 4 weeks. Then she began working full-time in that position again earning \$10 per hour (\$400 per week). On September 1, 2008, claimant began working for Manor Care Health Services for 10-20

<sup>&</sup>lt;sup>37</sup> Tyler v. Goodyear Tire and Rubber Company, \_\_ Kan. \_\_, 224 P.3d 1197 (2010).

<sup>&</sup>lt;sup>38</sup> The record does not contain a date of when this employment began or ended. Logically, the employment began after claimant completed her vocational training and before her present employment began. Thus, the Award will be calculated based upon this assumption.

hours per week at \$9.25 per hour as a transportation aide. Taking this employment at an average of 15 hours per week, claimant was earning \$138.85 per week.

Given these figures, claimant's actual wages and resulting wage loss is as follows: Beginning December 8, 2007 for 4 weeks claimant had a 66.80 percent wage loss (67.90 percent work disability), then for 2 weeks a 33.56 percent wage loss (51.28 percent work disability), then for 32.43 weeks a 100 percent wage loss (84.50 percent work disability) and then beginning September 1, 2008 a 77 percent wage loss (73 percent work disability).

Although claimant concedes that effective September 1, 2008 she began receiving social security benefits and is therefore subject to an offset under the provisions of K.S.A. 44-501(h), there is still the dispute as to whether the \$369 in pension benefits should be offset as well. As noted above, the testimony on this issue is anything but clear. Respondent posed a question as to the source of those funds and the claimant truthfully answered. However, the question, *as posed*, does not establish that respondent provided the funds for the pension. All that can be gleaned from the testimony contained in this record is that "all or part" of the money in that pension was provided by respondent. Without some specificity as to what portion of those monies were paid for by respondent, it is impossible to effectuate the offset respondent seeks. And the Board has held that this is respondent's burden to prove.<sup>39</sup> Accordingly, the Board finds that claimant's permanent partial impairment payments should not be offset by any pension payments and any offset is limited to the \$228.23 per week and commences as of September 1, 2008.

Finally, respondent is directed to identify three physicians from whom claimant can select one to direct her care as claimant requires ongoing care for the condition associated with her lower extremity complaints.

#### AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated February 5, 2010, is affirmed in part and modified in part as follows:

Claimant is entitled to 48 weeks of permanent partial disability at a rate of \$401.40 per week or \$19,267.20 for a 19 percent functional impairment. Beginning December 8, 2007, claimant is entitled to 4 weeks of permanent partial disability at a rate of \$401.40 per week or \$1,605.60 for a 67.90 percent work disability, followed by 2 weeks of permanent partial disability at a rate of \$401.40 per week or \$802.80 for a 51.28 percent work disability, followed by 32.43 weeks of permanent partial disability at a rate of \$401.40 per week or \$13,017.40 for a 84.50 percent work disability. Beginning September 1, 2008,

 $<sup>^{39}</sup>$  Rash v. Heartland Cement Company, Nos. 1,000,394 & 1,001,850, 2005 W L 1365145 (Kan. W CAB May 04, 2005).

claimant is entitled to 91.43 weeks permanent partial disability at a rate of \$173.17 per week or \$15, 832.93 for a 73 percent work disability.

As of June 3, 2010, claimant is entitled to 125.09 weeks of permanent partial disability at a rate of \$173.17 per week in the sum of \$21,661.83, for a total amount due of \$72,187.76.

IT IS SO ORDERED.	
Dated this day of June 2010.	
	BOARD MEMBER
	BOARD MEMBER
	BOARD MEMBER

c: Gary Peterson, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge